

§ 21.33

information and evidence it has obtained on behalf of the claimant. If VA does so, however, and the claimant subsequently provides the information and evidence specified in the notification within one year of the date of the notification, VA must readjudicate the claim. If VA's decision on a readjudication is favorable to the claimant, the award of vocational rehabilitation benefits and services shall take effect as if the prior decision by VA on the claim had not been made.

(e) *Incomplete applications.* If VA receives an incomplete application for benefits, it will notify the claimant of the information necessary to complete the application and will defer assistance until the claimant submits this information. If the information necessary to complete the application is not received by VA within one year from the date of such notice, VA cannot pay or provide any benefits based on that application.

(f) *Who VA will notify.* For the purpose of this section, when VA seeks to notify a claimant, it will provide such notice to:

- (1) The claimant;
- (2) His or her fiduciary, if any; and
- (3) His or her representative, if any.

(Authority: 38 U.S.C. 5102, 5103, 5103A(a)(3))

[74 FR 31855, July 6, 2009]

§ 21.33 VA has a duty to assist claimants in obtaining evidence.

The provisions of this section apply to claims that are governed by this subpart or subpart M of this part.

(a) *VA's duty to assist begins when VA receives a complete or substantially complete application.* (1) Except as provided in paragraph (d) of this section, upon receipt of a complete or substantially complete application for vocational rehabilitation benefits and services under this subpart or subpart M of this part, VA will:

- (i) Make reasonable efforts to help a claimant obtain evidence necessary to substantiate the claim; and
- (ii) Give the assistance described in paragraphs (b) and (c) of this section to an individual attempting to reopen a finally decided claim.

38 CFR Ch. I (7-1-14 Edition)

(2) VA will not pay any fees a custodian of records may charge to provide the records VA requests.

(Authority: 38 U.S.C. 5103A)

(b) *Obtaining records not in the custody of a Federal department or agency.* (1) VA will make reasonable efforts to obtain relevant records not in the custody of a Federal department or agency. These records include relevant records from:

- (i) State or local governments;
- (ii) Private medical care providers;
- (iii) Current or former employers; and
- (iv) Other non-Federal governmental sources.

(2) The reasonable efforts described in paragraph (b)(1) of this section will generally consist of an initial request for the records and, if VA does not receive the records, at least one follow-up request. The following are exceptions to this provision concerning the number of requests that VA generally will make:

(i) VA will not make a follow-up request if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile.

(ii) If VA receives information showing that subsequent requests to this or another custodian could result in obtaining the records sought, reasonable efforts will include an initial request and, if VA does not receive the records, at least one follow-up request to the new source or an additional request to the original source.

(3) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from non-Federal agency or department custodians. The claimant must provide enough information to identify and locate the existing records, including:

- (i) The person, company, agency, or other custodian holding the records;
- (ii) The approximate time frame covered by the records; and
- (iii) In the case of medical treatment records, the condition for which treatment was provided.

(4) If necessary, the claimant must authorize the release of existing

Department of Veterans Affairs

§21.33

records in a form acceptable to the person, company, agency, or other custodian holding the records.

(Authority: 38 U.S.C. 5103A)

(c) *Obtaining records in the custody of a Federal department or agency.* (1) Subject to paragraphs (c)(2) through (c)(4) of this section, VA will make as many requests as are necessary to obtain relevant records from a Federal department or agency. These records include but are not limited to:

- (i) Military records;
- (ii) Medical and other records from VA medical facilities;
- (iii) Records from non-VA facilities providing examination or treatment at VA expense; and
- (iv) Records from other Federal agencies.

(2) VA will cease its efforts to obtain records from a Federal department or agency only if VA concludes that the records sought do not exist or that further efforts to obtain those records would be futile. Cases in which VA may conclude that no further efforts are required include cases in which the Federal department or agency advises VA that the requested records do not exist or that the custodian of such records does not have them.

(3) The claimant must cooperate fully with VA's reasonable efforts to obtain relevant records from Federal department or agency custodians. At VA's request, the claimant must provide enough information to identify and locate the existing records, including:

- (i) The custodian or agency holding the records;
- (ii) The approximate time frame covered by the records; and
- (iii) In the case of medical treatment records, the condition for which treatment was provided.

(4) If necessary, the claimant must authorize the release of existing records in a form acceptable to the custodian or agency holding the records.

(Authority: 38 U.S.C. 5103A)

(d) *Circumstances where VA will refrain from or discontinue providing assistance in obtaining evidence for a claim if the substantially complete or com-*

plete application for benefits indicates that there is no reasonable possibility that any assistance VA would provide to the claimant would substantiate the claim. VA will discontinue providing assistance in obtaining evidence for a claim if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate the claim. Circumstances in which VA will refrain from or discontinue providing assistance in obtaining evidence include but are not limited to:

- (1) The claimant's ineligibility for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;
- (2) Claims that are inherently not credible or clearly lack merit;
- (3) An application requesting a benefit to which the claimant is not entitled as a matter of law; and
- (4) The claimant's lack of cooperation in providing or requesting information or evidence necessary to substantiate the claim.

(Authority: 38 U.S.C. 5103A)

(e) *Duty to notify claimant of inability to obtain records.* (1) VA will notify the claimant either orally or in writing when VA:

- (i) Has made reasonable efforts to obtain relevant non-Federal records, but is unable to obtain them; or
- (ii) After continued efforts to obtain Federal records, concludes that it is reasonably certain they do not exist or that further efforts to obtain them would be futile.

(2) For non-Federal records requests, VA may provide the notice to the claimant at the same time it makes its final attempt to obtain the relevant records.

(3) VA will make a written record of any oral notice conveyed under this paragraph to the claimant.

(4) The notice to the claimant must contain the following information:

- (i) The identity of the records VA was unable to obtain;
- (ii) An explanation of the efforts VA made to obtain the records;
- (iii) The fact described in paragraph (e)(1)(i) or (e)(1)(ii) of this section;
- (iv) A description of any further action VA will take regarding the claim,

§ 21.35

38 CFR Ch. I (7–1–14 Edition)

including, but not limited to, notice that VA will decide the claim based on the evidence of record unless the claimant submits the records VA was unable to obtain; and

(v) A notice that the claimant is ultimately responsible for obtaining the evidence.

(5) If VA becomes aware of the existence of relevant records before deciding the claim, VA will notify the claimant of the existence of such records and ask that the claimant provide a release for the records. If the claimant does not provide any necessary release of the relevant records that VA is unable to obtain, VA will ask that the claimant obtain the records and provide them to VA.

(6) For the purpose of this section, if VA must notify the claimant, VA will provide notice to:

- (i) The claimant;
- (ii) His or her fiduciary, if any; and
- (iii) His or her representative, if any.

(Authority: 38 U.S.C. 5102, 5103(a), 5103A)

[74 FR 31856, July 6, 2009]

DEFINITIONS

§ 21.35 Definitions.

(a) *Employment handicap*. This term means an impairment of a veteran's ability to prepare for, obtain, or retain employment consistent with such veteran's abilities, aptitudes, and interests.

(Authority: 38 U.S.C. 3101(1), 3102)

(b) *Independence in daily living*. This term means the ability of a veteran, without the service of others, or with a reduced level of the services of others, to live and function within such veteran's family and community.

(Authority: 38 U.S.C. 3101(2))

(c) *Program of education*. This term means:

- (1) A combination of subjects or unit courses pursued at a school which is generally acceptable to meet requirements for a predetermined educational, professional or vocational objective; or
- (2) Such subjects or courses which are generally acceptable to meet requirements for more than one objective if all objectives pursued are generally

recognized as being related to a single career field; or

(3) Any unit course or subject, or combination of courses or subjects, pursued by an eligible veteran at any educational institution required by the Administrator of the Small Business Administration as a condition to obtaining financial assistance under the provisions of section (7)(i)(1) of the Small Business Act.

(Authority: 15 U.S.C. 636(i)(1), 38 U.S.C. 3452(b))

(d) *Program of independent living services and assistance*. This term includes:

- (1) The services provided in this program that are needed to enable a veteran to achieve maximum independence in daily living, including counseling, diagnostic, medical, social, psychological, and educational services determined by the Department of Veterans Affairs to be necessary, and
- (2) The monthly allowance authorized by 38 U.S.C. Chapter 31 for such a veteran.

(Authority: 38 U.S.C. 3101(4))

(e) *Rehabilitated to the point of employability*. This term means that the veteran is employable in an occupation for which a vocational rehabilitation program has been provided under this program

(Authority: 38 U.S.C. 3101(5))

(f) *Rehabilitation program*. This term includes, when appropriate:

- (1) A vocational rehabilitation program (see paragraph (i) of this section);
- (2) A program of independent living services and assistance (see paragraph (d) of this section) for a veteran for whom a vocational goal has been determined not to be currently reasonably feasible; or

(Authority: 38 U.S.C. 3101(6); Pub. L. 99-576)

(3) A program of employment services for employable veterans who are prior participants in Department of Veterans Affairs or state-federal vocational rehabilitation programs.

(Authority: 38 U.S.C. 3117)

(g) *Serious employment handicap*. This term means a significant impairment